BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HOWARD J. POOL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,856
HOLLAND PAVING, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the July 6, 2007 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded medical treatment, with respondent ordered to provide "a list of qualified physicians"[1] from which claimant would designate an authorized treating physician.

Claimant appeared by his attorney, James R. Roth of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Douglas D. Johnson of Wichita, Kansas.

This Appeals Board Member (Board Member) adopts the same stipulations as the Administrative Law Judge (ALJ) and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held on July 5, 2007; the Discovery Deposition of Howard J. Pool taken June 19, 2007; and the documents filed of record in this matter.

[1] Preliminary hearing Order of July 6, 2007.

ISSUES

Respondent raised the following issues in its Application For Review Of Preliminary Order By Workers' Compensation Appeals Board filed with the Division of Workers Compensation on July 10, 2007:

1. Whether claimant suffered an "accident" which, pursuant to K.S.A. 2006 Supp. 44-508(d), was "caused by the employment."

2. Whether claimant's accidental injury arose out of and in the course of his employment pursuant to K.S.A. 2006 Supp. 44-508(f).

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent as a truck driver in the early summer of 2006.[2]

Claimant was injured on Saturday, May 5, 2007.[3] Claimant and another driver, Robert Trousdale, were driving trucks from Oregon, where they had been working on a project for respondent. They were heading to Cheyenne, Wyoming, and ultimately to Denver, Colorado, the site of the next work project. While on this trip, they stayed overnight on Friday, May 4, at the Oak Tree Inn motel in Green River, Wyoming

After leaving Green River, they intended to head for Cheyenne, to catch up with the rest of the crew. They then planned to travel to Denver on Sunday to the work site. The next job was at a railroad yard in Denver. Respondent's contract was with the Union Pacific Railroad company, repairing railroad crossings.

Respondent paid claimant $100 a day, plus $15 a day for food. In addition, respondent paid for claimant's motel room at the Oak Tree Inn. The truck and trailer being driven by claimant were the property of respondent.

While claimant was in Oregon and Wyoming, his supervisor was Mario Morales. Claimant was told by Mr. Trousdale, the other driver, that the motel they were going to be

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[2] Depo. of Claimant at 18.

[3] *Id*. at 24.

staying at that night was the Oak Tree Inn.[4] Claimant arrived at the Oak Tree Inn about 8:30 p.m. that evening. At that point, it was snowing and there was accumulation of snow on the ground.[5] Claimant stayed in the motel room the remainder of the evening.

The next morning, after he got up, claimant went to his truck and started it, to let it warm up. It was misting that morning, and the conditions were slushy. Claimant then went to the restaurant, which was part of the Oak Tree Inn.[6] Mr. Trousdale met claimant there. While claimant was at the restaurant, drinking coffee, he remembered that he had left some personal items, i.e., clothes, in the motel room.[7] Mr. Trousdale told claimant that he would wait at the restaurant for claimant to return.

Claimant had already checked out of his motel room. So he returned to the motel office to get the room key. As claimant was walking to the room, he fell on the icy and snowy concrete sidewalk, landing on his right side, and injuring his right shoulder. The snow had not been cleaned off of the walkway.

After claimant fell, he got back up and went into the room, retrieved his personal items from the room and then returned to the office to turn in the room key. He told the employees in the office that he had slipped and fallen. They just said "okay" and did not fill out an accident report.

After turning in the key and reporting the accident to the motel staff, claimant returned to the restaurant. Claimant told Mr. Trousdale that he had slipped and fallen, advising Mr. Trousdale that he was a little sore. The soreness was in claimant's right shoulder and his hip. Claimant drank more coffee with Mr. Trousdale, and then at about 10:00 a.m., claimant and Mr. Trousdale got on the road, driving from Green River to Cheyenne. They arrived at about 5:00 that afternoon. Claimant had problems driving. His right arm was sore and it was hard to shift. Claimant is right-handed.

When claimant got up on Sunday morning, he could not move his right arm or hand, and his right leg was cold. He had trouble sleeping that night because of the pain. Claimant told Mr. Trousdale that he was having right shoulder pain, and Mr. Trousdale told claimant to contact Mr. Morales. Mr. Morales, claimant's supervisor, took claimant to the emergency room at a hospital in Cheyenne. X-rays were taken. No bones were broken, but the doctor told claimant that his shoulder, lower back and hip had been badly bruised.

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[4] *Id*. at 28.

[5] *Id*. at 29.

[6] *Id*. at 35.

[7] *Id*. at 33.

Claimant was given three shots, one of which made him drowsy. Claimant was advised by the doctor not to drive.

On Sunday, the crew proceeded to Denver. However, due to his injury, claimant was not able to travel. So he stayed in Cheyenne, resting in a motel room until Wednesday morning. On that morning, he drove to Denver, a distance of 80 miles.[8]

When claimant got to Denver, Mr. Morales met up with claimant and took claimant over to the railroad yard. After workers unloaded and loaded claimant's truck, claimant was directed to drive to Wichita.[9]

After returning to Wichita, claimant was first examined by Steven R. Scheufler, M.D., in Wellington, Kansas. Claimant saw him on May 17, 2007, which was a week and a half after the accident happened. Dr. Scheufler gave claimant some medicine and ordered an MRI on claimant's shoulder, which claimant had on May 18.[10] Dr. Scheufler told claimant that he was going to need surgery,[11] took claimant off work, and placed claimant's arm in a sling.[12]

An appointment was scheduled for June 25 with Dr. Chan, the orthopedic surgeon. However, claimant cancelled this appointment because he was waiting to see if his workers compensation claim would be approved and the surgery authorized.[13]

Claimant has not had any treatment since seeing Dr. Scheufler in May. He has not returned to work for respondent, except for one day when he drove a truck to Chicago, Illinois. This truck had an automatic transmission. Claimant returned to Kansas by bus.

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[8] *Id*. at 47-49.

[9] *Id*. at 49-50.

[10] *Id*. at 50-51.

[11] See May 25, 2007 letter from claimant's attorney in the ALJ's file.

[12] *Id*.; see also off work slip dated May 25, 2007, in ALJ's file, which says that claimant has a torn rotator cuff and needs to be off work until seen by orthopedic surgeon Dr. Chan.

[13] *Id*. at 54.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[14]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[15]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[16]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[17]

Jurisdiction is conferred on the Kansas Workers Compensation Division where: "(1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[18] Here, respondent's principal place of employment is Wichita, Kansas.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee

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[14] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[15] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[16] K.S.A. 2006 Supp. 44-501(a).

[17] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[18] K.S.A. 44-506.

> occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[19]

There is an exception to the "going and coming" rule when travel upon the public roadways is an integral or necessary part of the employment.[20]

> In the case of a major deviation from the business purpose, most courts will bar compensation recovery on the theory that the deviation is so substantial that the employee must be deemed to have abandoned any business purpose and consequently cannot recover for injuries received, even though he or she has ceased the deviation and is returning to the business route or purpose.[21]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[22]

A situation similar to this case is discussed in *Messenger.*[23] In *Messenger*, the claimant was killed while traveling home from a distant drill site. The Kansas Court of Appeals noted in *Messenger* that:

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[24]

Claimant was traveling in a company-provided vehicle in order to deliver necessary equipment to the next job site for his employer. He was being paid for his travel time and

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[19] K.S.A. 2006 Supp. 44-508(f).

[20] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[21] *Id.* at 284.

[22] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[23] *Id.*

[24] *Id.* at 437.

he was being paid for his food, and his motel was provided. In addition, claimant was told at which motel he would be staying. Kansas has long recognized the exception to the "going and coming" rule, which allows compensation when travel on public roadways is an integral or necessary part of the employment.[25] Sometimes, custom or usage has made travel an element of the employment, and courts have held that such traveling furthers the purposes of the employer.[26]

The fact that claimant was returning to his motel room to retrieve personal items does not negate the fact his presence at that motel, in Wyoming, was necessitated by the travel requirements of this job. Additionally, where, as in this case, travel is required for the job, it is necessary for certain personal items to be brought along on the trip. And the retrieval of those items would not be a deviation from claimant's employment. Even though the clothes claimant was going to retrieve were personal items, they were necessary for the work-related trip. Therefore, having personal items on the trip would be a necessity of the travel, and the care and maintenance of those items, while being necessary for claimant's personal comfort, are also required in order for claimant to do his job.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[27] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered injuries arising out of and in the course of his employment when he fell while going to his motel room to retrieve personal items. The Order of the ALJ should, therefore, be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 6, 2007, should be, and is hereby, affirmed.

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[25] *Sumner v. Meier's Ready Mix, Inc.*, 282 Kan. 283, 144 P.3d 668 (2006).

[26] *Bell v. Allison Drilling Co.*, 175 Kan. 441, 264 P.2d 1069 (1953).

[27] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of October, 2007.

BOARD MEMBER

c: James R. Roth, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge